Public Knowledge

February 18, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: MB Docket No. 10-71, Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent

Dear Ms. Dortch:

On February 17, along with other members of the American Television Alliance (ATVA), John Bergmayer and Jodie Graham of Public Knowledge (PK) met with Commissioner Clyburn, her Chief of Staff and Media Legal Advisor Dave Grimaldi, and Mitchell Calhoun from her office. On February 18, again as part of ATVA, PK first met with Commissioner Baker and Jennifer Tatel, her legal advisor, and then with Commissioner Copps and Joshua Cinelli, his media advisor. The purpose of the meetings was to discuss the Commission's forthcoming retransmission consent NPRM.

PK agrees with the substance of the *ex parte* notices filed on behalf of ATVA. PK writes separately (and only on its own behalf) to emphasize the following points.

The increasing number of retransmission disputes demonstrates what happens when an outdated regulatory regime is applied to a changed marketplace. While the Commission should not delay in updating the broken retransmission regime, neither should it wait for similar, high-profile problems to surface before reevaluating its rules governing such areas as program carriage and program access. Since both the FCC and the Department of Justice recently noted the arrival of online video distributors as viable competitors to MVPDs,[1] the Commission should consider eliminating areas of unwarranted disparate regulatory treatment between OVDs and MVPDs (while still recognizing the difference between MVPDs that integrate transmission and content, and purely over-the-top providers). For example, the Commission should extend program access rules, which have been essential in permitting entry by DBS and telcos, to OVDs that elect to be subject to them.

In markets where the entry of DBS and telco MVPDs has increased MVPD competition, broadcasters are naturally no longer dependent on monopoly cable systems to reach most viewers. Thus, a broadcaster has less to lose by not being carried by a given MVPD—which emboldens it to demand higher fees and more concessions from all MVPDs. This acts as a pressure keeping MVPD prices to consumers higher than they might otherwise be, perversely denying consumers the benefits of increased competition. Thus, even "successful" negotiations that do not lead to blackouts can harm consumers. None of this is the result of a free market: as pro-market think tank the Free State Foundation recently observed, because of the many

[1] *See* Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion & Order*, MB Docket No. 10-56, FCC 11-4 (released January 20, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf; Competitive Impact Statement of the Department of Justice, United States v. Comcast Corp., 1:11-cv- 00106, (DC Cir. Jan. 18, 2011), *available at* http://www.justice.gov/atr/cases/f266100/266158.pdf.

regulatory obligations and privileges different parties are subject to today, "retransmission consent negotiations simply don't take place in a free market setting."[2] Thus, the Commission should not be swayed by arguments that suggest it is "interfering" with private bargaining when it begins to update its implementation of the retransmission consent regime Congress established with the 1992 Cable Act.

The purpose of the retransmission consent regime is to protect broadcasters so they are able to better fulfill the public trust they receive in exchange for free, exclusive access to valuable spectrum. This public trust includes things that only local broadcasters, and not national networks, can provide, such as content tailored to local concerns. But the record shows that networks are beginning to control retransmission consent negotiations, even for affiliated stations they do not own. The Commission should consider to what extent it is appropriate for entities other than the intended beneficiaries of the retransmission consent system to exert control over negotiations.

Some commenters have suggested that the FCC take certain unfair negotiating tactics (such as threatening to pull a signal right before a major sporting event) as evidence of bad faith on the part of a broadcaster. Along these lines, PK suggests that, when a station cannot reach a retransmission agreement with an MVPD, it should be bad faith *per se* for that station's network to deny access to that MVPD's broadband customers (as happened when Fox blocked access to online content to Cablevision broadband subscribers). It is inappropriate for networks and stations to further leverage their unfair bargaining position by denying content to Internet users, many of whom might not even be MVPD subscribers at all, or who might subscribe to a competing MVPD (e.g. DBS).

Respectfully submitted,

/s John Bergmayer
Staff Attorney
Public Knowledge

cc: Dave Grimaldi
Joshua Cinelli
Jennifer Tatel
Krista Witanowski
Rosemary Harold
Sherrese Smith

[2] RANDOLPH J. MAY, BROADCAST RETRANSMISSION NEGOTIATIONS AND FREE MARKETS (2010), available at http://freestatefoundation.org/images/Broadcast_Retransmission_Consent_Negotiations_and_Free_Markets_101610.pdf.